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**MAR 16 2009**

**OFFICE OF PETITIONS**

In re Application of :  
Byers, et al. : DECISION ON PETITION  
Application No. 10/796,727 :  
Filed: March 9, 2004 :  
Atty. Dkt. No: MP0787 :

This decision is in response to the petition to withdraw the holding of abandonment under 37 CFR 1.181, filed December 29, 2008

The petition under 37 CFR 1.181 to withdraw the holding of abandonment is hereby **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.181." This is not a final agency decision.

The application became abandoned July 16, 2008 for failure to timely submit a proper reply to the final Office action mailed April 15, 2008. The final Office action set a three month shortened statutory period of time for reply. Notice of Abandonment was mailed November 19, 2008.

Petitioners assert non-receipt of the final Office action. Petitioners indicate that a search of the file jacket and the docket records indicate that the final Office action was not received. Petitioners have included a copy of the docket records which purport to establish non-receipt of the final Office action.

The showing required to establish non-receipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney

docket number, the mail date of the Office action and the due date for the response. Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required. A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the non-received Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the non-received Office action must be submitted as documentary proof of non-receipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The instant petition does not establish non-receipt of the Notice in compliance with the procedures set forth at MPEP 711.03(c). Specifically, the petition fails to describe the system used for recording an Office action received at the correspondence address of record with the USPTO. It is unclear if the copy of the docket records provided by petitioners is a "master docket." Thus, it cannot be found that practitioner's docketing system is sufficiently reliable.

Any renewed petition must establish non-receipt of the final Office action as set forth at MPEP 711.03(c).

#### **ALTERNATE VENUE**

Petitioners may wish to consider filing a petition stating that the delay was unintentional. Petitioner's attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a

statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

**Mail Stop Petition**

Commissioner for Patents  
P.O. Box 1450  
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By facsimile:

(571) 273-8300

By hand delivery:

U.S. Patent and Trademark Office  
Customer Window, **Mail Stop Petition**  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

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